

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge
January 28, 2011

Les Trobman, General Counsel
Texas Commission on Environmental Quality
P.O. Box 13087
Austin Texas 78711-3087

Re: SOAH Docket No. 582-10-3857; TCEQ Docket No. 2009-1764-MSW-E; In Re:
Executive Director of the Texas Commission on Environmental Quality,
Petitioner v. Joabert Development Company, Respondent

Dear Mr. Trobman:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than February 17, 2011. Any replies to exceptions or briefs must be filed in the same manner no later than February 28, 2011.

This matter has been designated **TCEQ Docket No. 2009-1764-MSW-E; SOAH Docket No. 582-10-3857**. All documents to be filed must clearly reference these assigned docket numbers. All exceptions, briefs and replies along with certification of service to the above parties shall be filed with the Chief Clerk of the TCEQ electronically at <http://www10.tceq.state.tx.us/epic/efilings/> or by filing an original and seven copies with the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

A handwritten signature in black ink that reads "Thomas H. Walston".

Thomas H. Walston
Administrative Law Judge

THW:NL
Enclosures
cc: Mailing List

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STYLE/CASE: JOABERT DEVELOPMENT COMPANY
SOAH DOCKET NUMBER: 582-10-3857
REFERRING AGENCY CASE: 2009-1764-MSW-E

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

**ADMINISTRATIVE LAW JUDGE
ALJ AMI LARSON**

REPRESENTATIVE / ADDRESS

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JOABERT DEVELOPMENT COMPANY

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**SOAH DOCKET NO. 582-10-3857
TCEQ DOCKET NO. 2009-1764-MSW-E**

**EXECUTIVE DIRECTOR OF THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY,
Petitioner**

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BEFORE THE STATE OFFICE

VS.

OF

**JOABERT DEVELOPMENT
COMPANY,
Respondent**

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

I. INTRODUCTION

On March 9, 2010, the Executive Director (ED) of the Texas Commission on Environmental Quality (Commission or TCEQ) filed a Preliminary Report and Petition (EDPRP), alleging that Respondent Joabert Development Company (Respondent or Joabert) violated 30 TEX. ADMIN. CODE (TAC) § 330.15(c) by failing to prevent the improper disposal of municipal solid waste (MSW) on property owned or controlled by Joabert. The ED requested an administrative penalty totaling \$1,070.00 and corrective action requiring Joabert to remove and properly dispose of the MSW. The property in question is an undeveloped residential subdivision located at 6301 Granberry, San Antonio, Bexar County, Texas. Joabert contended that it did not own the property where most of the MSW was located. Joabert further stated that it did not authorize dumping of the MSW on the property, it took steps to prevent the dumping, and some of the material is not MSW.

Based on the evidence presented at the hearing, the Administrative Law Judge (ALJ) finds that Joabert suffered the dumping and disposal of MSW without written authorization of the Commission on property that Joabert controlled, in violation of 30 TAC § 330.15(c). Therefore, the ALJ recommends that the Commission assess an administrative penalty of \$1,070.00 against Joabert and require Joabert to complete the corrective action requested by the ED.

II. JURISDICTION / PROCEDURAL HISTORY

The hearing convened on December 6, 2010, before ALJ Thomas H. Walston in the William P. Clements Building, 300 West 15th Street, Austin, Texas. The ED was represented by attorney Stephanie Frazee. Joabert appeared through its directors, Burton Kahn and John Ripley. Jurisdiction was established at the preliminary hearing on May 20, 2010. The attached Proposed Order contains findings of fact and conclusions of law concerning jurisdiction and notice.

III. DISCUSSION

A. Overview/Background

On August 4, 2009, a TCEQ San Antonio Regional Office investigator observed MSW improperly disposed in several piles on an approximate 93-acre tract of property located at 6301 Granberry in San Antonio. The investigator estimated that the MSW totaled 300 cubic yards, and it consisted of asphalt shingles, carpet padding, plastics, garbage bags, brush, and ash piles. This tract was platted in the late 1940's as part of a larger residential subdivision called Robards, Texas, but that subdivision was never developed. Respondent Joabert replatted the 93-acre tract as a new subdivision called Royal Crest, but due to the current economic slump, Joabert has done little development of the tract other than clearing brush. The investigator's research indicated that Joabert was developing the proposed Royal Crest Subdivision, but Joabert actually owned only about one-third of the platted lots.

Based on this investigation, the ED alleged that Joabert violated 30 TEX. ADMIN. CODE § 330.15(c). That rule provides: "Except as otherwise authorized by this chapter, a person may not cause, suffer, allow, or permit the dumping or disposal of MSW without the written authorization of the commission."¹

¹ 30 TAC § 330.3 defines disposal, MSW, garbage, and rubbish as follows:

(44) Disposal – The discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste (whether containerized or uncontainerized) into or on any land or water such that solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including groundwater.

Joabert acknowledged that some unauthorized dumping of MSW has occurred on the Royal Crest Subdivision tract. However, it argued that it should not be held responsible because most of the MSW was located on lots that it does not own. Joabert also argued that it lacked authority to control the areas of the tract where streets were platted in the 1940's. In Joabert's view, Bexar County should be responsible for any MSW dumped on those areas.

In response, the ED argued that Joabert controls the entire Royal Crest Subdivision tract as the developer, even if it does not own the entire tract. The ED also pointed out that the roads platted in the 1940's were never built, and there is no evidence that Bexar County ever accepted or assumed responsibility for the platted but un-built roads.

B. ED's Evidence and Arguments

The ED introduced nineteen exhibits into evidence and presented testimony from three witnesses: Jeffrey Seiler and Melissa Story, TCEQ Environmental Investigators, and Rajesh Aghsarya, a TCEQ Enforcement Coordinator.

Jeffrey Seiler: Mr. Seiler has been a TCEQ Environmental Investigator for fourteen years. He works in the air division and is based in San Antonio. Mr. Seiler explained that he

(88) Municipal solid waste – Solid waste resulting from or incidental to municipal, community, commercial, institutional, or recreational activities, and includes garbage, rubbish, ashes, street cleanings, dead animals, abandoned automobiles, and all other solid waste other than industrial solid waste.

(56) Garbage – Solid waste consisting of putrescible animal and vegetable waste materials resulting from the handling, preparation, cooking, or consumption of food, including waste materials from markets, storage facilities, and the handling and sale of produce and other food products.

(130) Rubbish – Nonputrescible solid waste (excluding ashes), consisting of both combustible and noncombustible waste materials. Combustible rubbish includes paper, rags, cartons, wood, excelsior, furniture, rubber, plastics, yard trimmings, brush or similar materials; noncombustible rubbish includes glass, crockery, tin cans, aluminum cans, and similar materials that will not burn at ordinary incinerator temperatures (1,600 degrees Fahrenheit to 1,800 degrees Fahrenheit).

primarily investigates complaints related to air violations, but he also works on MSW cases due to air complaints dealing with burning of MSW.

Mr. Seiler testified that before the TCEQ received the complaint involved in this case, it had investigated several other complaints concerning the Royal Crest Subdivision property. Specifically, the TCEQ investigated complaints in September 2007 about smoke coming from the property;² in January 2009 about uncontrolled dust blowing off the property;³ in April 2009 again about dust blowing off the property;⁴ and in May 2009 concerning compliance with storm water regulations.⁵ Mr. Seiler noted that during each of these prior investigations, Joabert Development Company was listed as the Respondent and Mr. Burton Kahn was listed as an owner of Joabert and as the primary contact.

In the TCEQ Investigation Report for the September 2007 complaint, Mr. Layne Perelli, the TCEQ investigator, reported the following: "I next called Mr. Kahn, and he explained that he was developing about 500 lots at the site for a subdivision to be called Royal Crest and that he was part owner of the property. . . . Mr. Kahn asked if he could receive the investigation report because his company, Joabert Development Inc., had overall responsibility for the property development and would be the responsible party for this incident."⁶

Mr. Seiler investigated the January and April 2009 complaints concerning dust blowing off the 93-acre tract. He also listed Joabert Development as the respondent and Mr. Burton Kahn as the contact person for both investigations. During his investigation in January 2009, Mr. Seiler encountered an employee on the property who directed him to Mr. Kahn. On this occasion, Mr. Kahn indicated that Mr. John Ripley was also an owner, and he stated that the development had been slowed because of business. Mr. Kahn also stated that he had occasionally been wetting the property with a watering truck. Mr. Sieler did not find that a

² Ex. ED-1.

³ Ex. ED-2.

⁴ Ex. ED-3.

⁵ Ex. ED-4.

⁶ Ex. ED-1 at Bates page 64.

violation had occurred, but he instructed Mr. Kahn to continue watering the ground to control dust.⁷

During his investigation of the April 2009 complaint about blowing dust, Mr. Seiler observed a truck dumping sand on the south end of the property. He also noted several piles of brush. Some of these piles had already been burned and contained remnants of tires and mattresses. Others had not yet been burned and contained mattresses, furniture, broken toys, treated lumber, other construction waste, and cactus that did not appear native to the property. Mr. Seiler again listed Joabert Development as the respondent and Mr. Kahn as the contact. He called Mr. Kahn, who said that trespassers must be illegally dumping on the property. Mr. Kahn also indicated that he would try to stop the illegal dumping and would not burn the mattresses and furniture. Mr. Seiler's report for this investigation included several photographs of the property and the trash piles.⁸ Mr. Seiler added that the 93-acre tract contained no paved roads, no street signs, no houses, and no stakes marking the lot boundaries. He agreed that some of the brush shown in the pictures could have been generated at the site, but the couches, furniture, tires, and the like were brought from other locations.

Mr. Seiler conducted an on-site investigation on August 4, 2009, concerning the complaint involved in this proceeding. TCEQ Investigator Melissa Story assisted. In July 2009, the TCEQ had received an anonymous complaint about dumping on the property. When Mr. Seiler inspected the property on August 4, he saw the same burned piles he had seen at the site in April 2009 plus new waste piles. He also observed that no further development had occurred on the property. Mr. Seiler took photographs of the various waste piles, both burned and unburned.⁹ He also made a diagram that roughly estimated where the piles were located on the property.¹⁰ On August 5, 2009, Mr. Seiler spoke to Mr. Kahn by telephone. Mr. Kahn indicated that he was having problems with people illegally dumping on the site, but he did not inform Mr. Seiler when he would remove the MSW from the property. Based on the

⁷ Ex. ED-2 at Bates page 73-75.

⁸ Ex. ED-3 at Bates pages 85-125.

⁹ Ex. ED-4 at Bates pages 157-185.

¹⁰ Ex. ED-4 at Bates page 155.

investigation, Mr. Seiler recommended an enforcement action against Joabert for the illegally dumped MSW.

Concerning ownership and control of the Royal Crest Subdivision property, Mr. Seiler testified that deeds and Bexar County Appraisal District records obtained by TCEQ showed that Joabert owned some of the lots at the site.¹¹ In addition, Joabert obtained a Large Construction Site Notice in 2008 under TPDES Authorization Number TXR50MS60 for the entire Royal Crest Subdivision tract. This Notice listed Joabert Development Company as the applicant and as the operator of the site, and it listed Mr. Kahn as the operator contact.¹² Further, Mr. Seiler testified that Mr. Kahn represented to him that Joabert operated the site as a whole and was responsible for the entire site. Likewise, Mr. Kahn sent Mr. Seiler an email on October 15, 2009, referencing "ROYAL CREST SUB. RE TELCO TODAY," which stated: "Enclosed is a map of our project. If you see any dumping on an inspection, please note it and we will take care of it, one way or another. Thanks, Burton Kahn, P.E."¹³ In Mr. Seiler's opinion, the statements and actions by Joabert and Mr. Kahn in this investigation and in the prior investigations showed that Joabert was the operator and was responsible for the entire Royal Crest Subdivision tract, even if Joabert did not own the entire tract. He further testified that as of December 3, 2010, Joabert had not brought the site into compliance. To bring it into compliance, Joabert must clean the site, provide receipts showing proper disposal of the MSW, and put up a fence or take other action to prevent the illegal dumping.

On cross examination, Mr. Seiler acknowledged that some of the trash piles had brush that appeared to be from the Royal Crest site. He agreed that it was permissible for Joabert to burn this brush. However, he added that some of the piles also had mattresses, box springs, tires, cactus, and other materials that were not from the site. He roughly estimated that three-fourths of the material he saw in the piles was brush and one-fourth was other material. In addition, ashes remained at the site for the piles that had been burned. Further, Mr. Seiler observed that

¹¹ Ex. ED-7 at Bates pages 203-345, Bexar County Appraisal District records; Ex. ED-12 at Bates pages 347-492, deeds.

¹² ED Ex. 12 at Bates pages 506-530, Large Construction Site Notice.

¹³ ED Ex. 12 at Bates page 500, email dated October 15, 2009.

one of the waste piles appeared to be the remains of a mobile home that had been demolished at the property. He had seen an intact mobile home at the site on a prior visit, and he believed the demolition debris was from that mobile home.

Mr. Seiler stated that he did not do a formal calculation of the amount of MSW at the site or a formal calculation of the percentage comprised of brush. Rather, he simply made an estimate based on his observations. He also agreed that the email from Mr. Kahn dated October 15, 2009, did not include the name "Joabert." In addition, Mr. Seiler conceded that when he was at the Royal Crest site, he could not say which parts were owned by Joabert and which parts were not, or whether the MSW piles were on the property owned by Joabert. Likewise, he could not say who dumped the MSW on the property.

Finally, Mr. Seiler agreed that on his last visit to the property, he observed that Joabert had taken some steps to prevent further dumping. Some large pieces of earth moving equipment were parked to block one roadway onto the property, and some "No Dumping" signs had been posted.

On redirect examination, Mr. Seiler reiterated that some of the brush piles were mixed with other MSW. He also stated that Mr. Kahn was a director of Joabert and had been designated as the contact person for this property. During all of his dealings with Mr. Kahn, Mr. Seiler was never told that Joabert was the wrong party. Mr. Seiler added that he was able to drive past the equipment Joabert had placed in the roadway, and he had no trouble accessing the site.

Melissa Story: Ms. Story has been a TCEQ Environmental Investigator for 12 years. She primarily investigates complaints related to MSW and petroleum storage tanks. Ms. Story accompanied Mr. Seiler on the investigation of the Royal Crest site on August 4, 2009. She observed the piles of debris depicted in the photographs that accompany the investigative report. She noted that some piles were burned and some were not. Ms. Story stated that the property looked like someone had begun to develop the tract. However, she said there were no roads, but only dirt paths, and there were no lot markers. Ms. Story also testified that unauthorized

dumping of this type is a common occurrence. She said it was hard to determine whether the brush piles were from the site or brought from elsewhere, but the non-brush MSW clearly appeared to be brought in from off site. Ms. Story said that TCEQ does not typically do a survey to determine the exact location of waste piles. She also explained that an entity such as Joabert that operates a site can be held responsible even if it does not own the site and even if it did not intend to use the site as a dump.

Ms. Story said that she normally makes a general estimate of the amount of waste rather than an exact calculation. She explained that a rule violation is not based on the amount of waste, although the amount of the penalty can be based on the volume of waste. Ms. Story viewed the site on December 3, 2010, and observed that the waste had not been removed. She stated that Joabert needs to remove and properly dispose the waste, provide receipts to confirm this, and make efforts to prevent future dumping.

On cross-examination, Ms. Story agreed that she did not know where the brush came from. However, she added that the brush piles were mixed with other MSW. Ms. Story acknowledged that she had no personal knowledge about who was doing site work on the property and that she had to drive around heavy equipment at the main entrance to access the property.

Rajesh Aghasarya: Mr. Aghasarya is an Enforcement Coordinator for TCEQ. He reviewed this enforcement proceeding for technical requirements, and he calculated the proposed administrative penalty of \$1,070.00. Mr. Aghasarya explained in detail how he calculated the penalty, and he stated that it complies with the Commission's Penalty Policy. He also explained that any amount of MSW less than 1,000 cubic yards is considered a minor violation; thus, even if the MSW on respondent's property is less than the 300 cubic yards estimated by the investigators, the administrative penalty would be the same. Mr. Aghasarya agreed with the corrective action proposed by the ED.

On cross-examination, Mr. Aghasarya acknowledged that he had no evidence that Joabert actually disposed of the MSW on the property.

Argument: Staff argued that 30 TAC § 330.15(c) does not limit responsibility to a land owner for improperly dumped MSW. Instead, an operator or other person who controls the property can also be held responsible. Staff pointed out that Joabert held itself out as controlling the Royal Crest Subdivision property. In addition, Bexar County has not exercised control over the old platted streets, and no lot lines or streets are marked on the property. Finally, Staff argued that the proposed penalty was calculated accurately and fairly and that the proposed corrective action is appropriate.

C. Joabert's Evidence and Argument

Respondent Joabert introduced five exhibits into evidence and presented testimony from Mr. Burton Kahn.

Burton Kahn: Mr. Kahn received a degree in civil engineering from MIT in 1955, and he has been a registered professional engineer in Texas since 1985. He stated that the platted Royal Crest Subdivision is located northeast of San Antonio and comprises 107.62 acres. He noted that Royal Crest is platted on property previously platted in the late 1940's and early 1950's as the Robards Subdivision, Phases I and II. However, the Royal Crest Subdivision plats, including the proposed streets, are different from the lots and streets platted in Robards, Phases I and II.

Mr. Kahn testified that Joabert submitted the current plats for Royal Crest to the City of San Antonio because the property is within San Antonio's extraterritorial jurisdiction (ETJ). The old plats for the Robards subdivisions were submitted by the previous developer to Bexar County.

Concerning the MSW on the site, Mr. Kahn stated that neither he nor anyone under his control put it on the property. Rather, unknown persons dumped the MSW at the site.

Of the 107 acres comprising the site, Mr. Kahn testified that Joabert owns 35 acres, others own 39 acres, and the old roadway easements cover about 38.5 acres.¹⁴ He prepared a plat of the proposed Royal Crest Subdivision and has offered to dedicate streets, easement, and alleys to Bexar County. Bexar County has not accepted the dedication for Royal Crest, but Mr. Kahn believed Bexar County did accept the dedication for Robards many years ago. Therefore, he also believed that it is necessary for Bexar County to abandon those old platted roads before Joabert can further develop Royal Crest.

Mr. Kahn said that he is the engineer for the entire Royal Crest tract, but Joabert only owns about 30 percent of the property. No homes are located on the property, but one of the other owners has built an industrial shop on the property. He prepared a plat of the site with Joabert's property highlighted. Mr. Kahn also drew on the plat where he believed the MSW is located. This is shown on Respondent's Exhibit 4. According to Mr. Kahn, most of the MSW is located on property not owned by Joabert.¹⁵ Mr. Kahn added that he is the sole owner of Contour Construction, which has done the site work at Royal Crest, while he and Mr. Ripley jointly own Joabert. He emphasized that Contour paid all the workers who did site preparation work. In Mr. Kahn's view, persons other than Joabert should be held liable for the MSW dumped on the Royal Crest tract.

Mr. Kahn stated that he calculated that the MSW on the property totaled only 40 cubic yards, including the demolished trailer, or about 15 cubic yards excluding the trailer. He did not include brush in his calculation, because he asserted that all the brush came from this property. And he stated that other persons dumped the MSW onto the brush piles. In Mr. Kahn's opinion, it is not fair to hold Joabert responsible for the MSW on the property under these circumstances.

Argument: Joabert argued that the ED did not prove that the dumped MSW was located on property owned by Joabert. Instead, Mr. Kahn's testimony indicated that most of the MSW was likely on property owned by others. Further, Joabert argued that Contour Construction

¹⁴ The ALJ notes that these amounts total 112.5 acres rather than 107 acres.

¹⁵ Ex. R-4, site plat. The notations showing the locations for the MSW reflect the photograph number and the Bates page numbers of the ED's exhibits.

actually controlled the site, and that it took action to try to stop the dumping. Joabert stated that it cannot control other property owners or the areas where streets are dedicated to Bexar County. It also argued that it did not have knowledge that dumping would occur on the property and cannot be held strictly liable for actions by other unknown persons.

D. ALJ's Analysis

The ALJ recommends that the Commission assess an administrative penalty against Joabert and require it to complete the proposed corrective action. The evidence established that Joabert controlled the entire Royal Crest Subdivision property as developer, even it did not own the entire tract, and that Joabert suffered the unauthorized disposal of MSW on the property. The evidence was undisputed that:

- MSW has been disposed on the Royal Crest Subdivision property;
- The Commission has not issued an authorization for the disposal of MSW on the Royal Crest Subdivision property;
- Joabert is developing the Royal Crest Subdivision property;
- Joabert owns some but not all of the Royal Crest Subdivision property on which MSW has been disposed; and
- Joabert has not removed or properly disposed of the MSW improperly dumped on the Royal Crest Subdivision property.

The ED based this enforcement action on 30 TAC § 330.15(c). That rule provides: "Except as otherwise authorized by this chapter, a person may not cause, suffer, allow, or permit the dumping or disposal of MSW without the written authorization of the commission." The ED presented no evidence that Joabert allowed or permitted the dumping or disposal of MSW on the Royal Crest tract. Indeed, the evidence showed that Joabert took some action to stop the dumping by posting "No Dumping" signs and by placing large pieces of equipment on pathways in an effort to block the entrance to the property. Some brush piles on the property were caused by Joabert clearing the property, but the ED agreed that brush cleared from the Royal Crest property did not constitute unauthorized MSW. However, the ED's evidence did establish that Joabert suffered the unauthorized disposal by unknown persons of MSW on the property, which

constitutes a violation of 30 TAC § 330.15(c). In this context, the common dictionary meaning of “suffer” includes being forced to endure the infliction or imposition of an adverse event or occurrence.¹⁶ By this definition, Joabert did “suffer” the unauthorized dumping or disposal of MSW when Joabert was forced to endure the infliction or imposition of unauthorized dumping by unknown persons of MSW on the Royal Crest Subdivision property, which it controlled as developer.

Joabert offered evidence that it does not own the specific lots within the Royal Crest Subdivision where much of the MSW was dumped, and it argued that it should not be responsible for MSW that was dumped on property it did not own. In response, the ED stressed that section 330.15(c) does not limit responsibility for unauthorized MSW to the property owner. The ED is correct that section 330.15(c) does not expressly limit responsibility to landowners. However, the rule does apply only to persons who caused, suffered, allowed, or permitted unauthorized dumping or disposal of unauthorized waste. To “suffer, allow, or permit” unauthorized dumping or disposal of MSW onto property necessarily infers that the person to be held responsible must have had some right to control the property where the MSW was dumped, such as an owner or lessee or in some other capacity. The evidence established that even though Joabert did not own all of the lots in the Royal Crest Subdivision, it did exercise control over the entire tract in its capacity as developer. The evidence showed that:

- Joabert, which is partly owned by Mr. Kahn, arranged for Mr. Kahn’s company Contour Construction to clear brush on the Royal Crest Subdivision property;
- In all of his dealings with the TCEQ investigator on multiple investigations, Mr. Kahn indicated that Joabert would be responsible for taking care of the MSW on the Royal Crest Subdivision property;
- Mr. Kahn and Joabert arranged for heavy equipment to be parked at the entrance of the property and posted “No Dumping” signs in an effort to stop the dumping;
- Joabert prepared plats and drawings of the Royal Crest Subdivision and made efforts to get the subdivision approved by the City of San Antonio; and

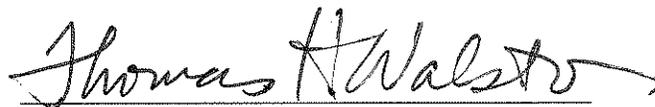
¹⁶ Suffer: “to submit to or be forced to endure the infliction, imposition, or penalty of : bear as a victim <~ martyrdom> <~ a years’ imprisonment>” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1993).

- Joabert designated itself as the operator of the entire Royal Crest Subdivision tract when it applied for a stormwater discharge permit.

Therefore, even though Joabert did not own the entire Royal Crest Subdivision property, it did control the property as the developer, and, in its capacity as developer, Joabert suffered the unauthorized dumping or disposal of MSW on the Royal Crest Subdivision property. Therefore, the ALJ finds that the Commission may hold Joabert liable under 30 TAC § 330.15(c), as the developer that controlled the Royal Crest Subdivision property, for the unauthorized dumping or disposal of MSW on that property. That the persons who dumped the MSW on the property, if their identities were known, or the other owners of the lots where the MSW is located could also be held liable under 30 TAC § 330.15(c) does not prevent the ED from taking this action against Joabert.

Based on all of the evidence and for the reasons stated above, the ALJ recommends that the Commission find that Respondent Joabert Development Company violated 30 TAC § 330.15(c), and that the Commission adopt the attached proposed order, which assesses an administrative penalty of \$1,070.00 and requires Joabert to complete specified corrective actions as requested by the ED.

ISSUED January 28, 2011.



**THOMAS H. WALSTON
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER Assessing Administrative Penalties Against
and Requiring Corrective Action By
JOABERT DEVELOPMENT COMPANY
TCEQ DOCKET NO. 2009-1764-MSW-E
SOAH DOCKET NO. 582-10-3857**

On _____, the Texas Commission on Environmental Quality (Commission or TCEQ) considered the Executive Director's Preliminary Report and Petition (EDPRP) recommending that the Commission enter an enforcement order assessing administrative penalties against and requiring corrective action by Joabert Development Company (Respondent). Thomas H. Walston, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), conducted a public hearing on this matter on December 6, 2010, in Austin, Texas, and presented the Proposal for Decision.

After considering the ALJ's Proposal for Decision, the Commission makes the following Findings of Fact and Conclusions of Law.

I. FINDINGS OF FACT

1. Respondent is a Texas for-profit corporation located at 1706 Alpine Circle, San Antonio, Texas. Mr. Burton Kahn and Mr. John Ripley are owners and directors of Respondent, and Mr. Kahn is the registered agent for Respondent.
2. Respondent is developing and owns part of an approximate 93-acre tract of real property located at 6301 Granberry, San Antonio, Bexar County, Texas (hereafter referred to as "the Site").
3. Respondent has platted the Site as a subdivision called Royal Crest Subdivision, but due to the current economic slump, Respondent has done little development of the Site other than

clearing brush. Respondent owns about one-third of the lots platted in the Royal Crest Subdivision.

4. On August 4, 2009, a TCEQ San Antonio Regional Office investigator observed municipal solid waste (MSW) improperly disposed in several piles on the Site. The investigator estimated that the MSW totaled 300 cubic yards, and it consisted of asphalt shingles, carpet padding, plastics, garbage bags, brush, and ash piles.
5. Some of the MSW improperly disposed on the Site is located on lots owned by Respondent while the remainder of the MSW is located on lots not owned by Respondent.
6. Prior to August 4, 2009, the TCEQ had investigated several other complaints concerning the Site. Specifically, the TCEQ investigated complaints in September 2007 about smoke coming from the Site; in January 2009 about uncontrolled dust blowing off the Site; in April 2009 again about dust blowing off the Site; and in May 2009 concerning compliance with storm water regulations. During each of these prior investigations, Joabert Development Company was listed as the Respondent, and Mr. Burton Kahn was listed as an owner of Respondent and as the primary contact.
7. In 2008 Respondent obtained a Large Construction Site Notice under TPDES Authorization Number TXR50MS60 for the Site. This Notice listed Respondent as the applicant and as the operator of the Site, and it listed Mr. Kahn as the operator contact.
8. During the investigation made the basis of this proceeding, Mr. Kahn represented to the TCEQ investigator that Respondent operated the Site as a whole and was responsible for the entire Site.
9. In all of his dealings with the TCEQ investigator on multiple investigations, Mr. Kahn indicated that Respondent would be responsible for taking care of the MSW on the Site.
10. Although Respondent did not own all of the lots platted on the Site, Respondent controlled the entire Site as the developer.

11. Some of the MSW in the piles on the Site was brush removed from the site by Respondent.
12. Some of the MSW consisted of ash piles, asphalt shingles, carpet padding, plastics, lumber pieces, garbage bags, a demolished mobile home, and cactus dumped on the Site by unknown persons.
13. Respondent did not allow or permit those unknown persons to dump MSW on the Site.
14. Respondent arranged for heavy equipment to be parked at the entrance of the Site and posted “No Dumping” signs in an effort to stop the dumping
15. The MSW dumped on the Site was less than 1,000 cubic yards.
16. Respondent has not removed or properly disposed of the MSW dumped on the Site.
17. On September 30, 2009, the TCEQ issued a Notice of Enforcement to Respondent.
18. On March 9, 2010, the Executive Director (ED) issued the EDPRP in accordance with TEX. WATER CODE ANN. § 7.054, alleging that Respondent violated 30 TEX. ADMIN. CODE § 330.15(c) by failing to prevent the unauthorized disposal of MSW at the Site.
19. The ED recommended the imposition of an administrative penalty in the amount of \$1,070.00, and corrective action to bring the site into compliance.
20. The proposed penalty is the base penalty of \$1,000.00 for the violation, plus a \$70.00 enhancement due to Respondent’s compliance history.
21. An administrative penalty of \$1,070.00 takes into account culpability, economic benefit, good faith efforts to comply, compliance history, release potential, and other factors set forth in TEX. WATER CODE ANN. § 7.053 and in the Commission’s 2002 Penalty Policy.
22. On March 16, 2010, Respondent requested a contested case hearing on the allegations in the EDPRP.

23. On April 19, 2010, the case was referred to SOAH for a hearing.
24. On April 27, 2010, the Commission's Chief Clerk issued a notice of the preliminary hearing to all parties, which included the date, time, and place of the hearing, the legal authority under which the hearing was being held, and the violations asserted.
25. At the preliminary hearing held on May 20, 2010, the ED established jurisdiction to proceed.
26. The hearing on the merits was conducted on December 6, 2010, in Austin, Texas, by ALJ Thomas H. Walston. The ED was represented by attorney Stephanie Frazee, and Respondent appeared through its directors, Burton Kahn and John Ripley.
27. The record closed December 6, 2010, at the conclusion of the hearing.

II. CONCLUSIONS OF LAW

1. Under TEX. WATER CODE ANN. § 7.051, the Commission may assess an administrative penalty against any person who violates a provision of the Texas Water Code, the Texas Health & Safety Code, or any rule, order, or permit adopted or issued thereunder.
2. Under TEX. WATER CODE ANN. § 7.052, a penalty may not exceed \$10,000 per violation, per day, for the violations at issue in this case.
3. Respondent is subject to the Commission's enforcement authority, pursuant to TEX. WATER CODE ANN. § 7.002.
4. Additionally, the Commission may order the violator to take corrective action. TEX. WATER CODE ANN. § 7.073.
5. As required by TEX. WATER CODE ANN. § 7.055 and 30 TEX. ADMIN. CODE §§ 1.11 and 70.104, Respondent was notified of the EDPRP and of the opportunity to request a hearing on the alleged violations or the penalties or corrective actions proposed therein.

6. As required by TEX. GOV'T CODE ANN. §§ 2001.051(1) and 2001.052; TEX. WATER CODE ANN. § 7.058; 1 TEX. ADMIN. CODE § 155.401, and 30 TEX. ADMIN. CODE §§ 1.11, 1.12, 39.25, 70.104, and 80.6, Respondent was notified of the hearing on the alleged violations and the proposed penalties.
7. SOAH has jurisdiction over matters related to the hearing in this matter, including the authority to issue a Proposal for Decision with Findings of Fact and Conclusions of Law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.
8. Respondent controlled the Site on which MSW was dumped and disposed without authorization from the TCEQ.
9. Respondent suffered the dumping or disposal of MSW on the Site without the written authorization of the TCEQ
10. Based on the above Findings of Fact and Conclusions of Law, Respondent violated 30 TEX. ADMIN. CODE § 330.15(c).
11. In determining the amount of an administrative penalty, the ED considered several factors, as required by TEX. WATER CODE ANN. § 7.053, including:
 - The impact or potential impact on public health and safety, natural resources and their uses, and other persons;
 - The nature, circumstances, extent, duration, and gravity of the prohibited act;
 - The history and extent of previous violations by the violator;
 - The violator's degree of culpability, good faith, and economic benefit gained through the violation;
 - The amount necessary to deter future violations; and
 - Any other matters that justice may require.
12. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.

11. Based on consideration of the above Findings of Fact, the factors set out in TEX. WATER CODE ANN. § 7.053, and the Commission's Penalty Policy, the Executive Director correctly calculated the penalty for the alleged violation and a total administrative penalty of \$1,070.00 is justified and should be assessed against Respondent.
12. Based on the above Findings of Fact, Respondent should be required to take the corrective action measures recommended by the ED.

NOW, THEREFORE, IT IS ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:

1. Joabert Development Company is assessed an administrative penalty in the amount of \$1,070.00 for violations of 30 TEX. ADMIN. CODE § 330.15(c). The payment of this administrative penalty and Joabert Development Company's compliance with all the terms and conditions set forth in this Order completely resolve the matters set forth by this Order in this action. The Commission shall not be constrained in any manner from requiring corrective actions or penalties for other violations that are not raised here. All checks submitted to pay the penalty assessed by this Order shall be made out to "Texas Commission on Environmental Quality." Administrative penalty payments shall be sent with the notation "Re: Joabert Development Company; Docket No. 2009-1764-MSW-E" to:

Financial Administration Division, Revenues Section
Attention: Cashier's Office, MC 214
Texas Commission on Environmental Quality
P.O. Box 13088
Austin, Texas 78711-3088

2. Immediately upon the effective date of this Order, Joabert Development Company shall cease to cause, suffer, allow, or permit any additional municipal solid waste to be stored, processed, or disposed of at the Site.

3. Within 30 days after the effective date of the Commission Order, Joabert Development Company shall remove all MSW at the Site and dispose of it at an authorized facility.
4. Within 45 days after the effective date of the Commission Order, Joabert Development Company shall submit written certification as described below, and include detailed supporting documentation including photographs, receipts, and/or other records to demonstrate compliance with the above ordering provisions. The certification shall be notarized by a State of Texas Notary Public and include the following certification language:

“I certify under penalty of law that I have personally examined and am familiar with the information submitted and all attached documents, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.”

The certification shall be submitted to:

Order Compliance Team
Enforcement Division, MC 149A
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

with a copy to:

Waste Section Manager
Texas Commission on Environmental Quality
San Antonio Regional Office
14250 Judson Road
San Antonio, Texas 78233-4480

5. The Executive Director may refer this matter to the Office of the Attorney General of the State of Texas (OAG) for further enforcement proceedings without notice to Respondent if the Executive Director determines that Respondent has not complied with one or more of the terms or conditions in this Commission Order.

6. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.
7. The effective date of this Order is the date the Order is final, as provided by 30 TEX. ADMIN. CODE § 80.273 and TEX. GOV'T CODE ANN. § 2001.144.
8. As required by TEX. WATER CODE ANN. § 7.059, the Commission's Chief Clerk shall forward a copy of this Order to Respondent.
9. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

ISSUED:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Bryan W. Shaw, Ph.D., Chairman
For the Commission